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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 324

SAM GOODY,

Petitioner,

against

RAXOR CORPORATION, SORIA SALES CORPORATION and CAPITOL RECORDS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

The petition of Sam Goody prays that a writ of certiorari issue to review the final judgment of the Court of Appeals of the State of New York in this cause rendered June 4, 1954, and entered on June 28, 1954 in the office of the Clerk of the County of New York on order of the Supreme Court of the State of New York, County of New York, dated June 17, 1954.

Opinions Below

The single opinion of the Court of Appeals in this and two companion cases argued together with it has been reported at 307 N. Y. 229, —— N. E. 2d—— (1954). The

decision of the Appellate Division modifying and affirming the judgment of the Supreme Court was without opinion, and was reported in 282 App. Div. 921, 125 N. Y. S. 2d 643 (1953). The opinion of the Supreme Court after trial appeared in 129 New York Law Journal, p. 1090, cols. 3 and 4 (April 2, 1953) and was published in 121 N. Y. S. 2d 882 (1953).

All opinions are set forth in Appendix A.

The judgment of the Supreme Court of the State of New York as modified by the Appellate Division, First Department, and as so modified, affirmed by the Court of Appeals of the State of New York, is set forth in Appendix B.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28 of the United States Code, § 1257(3). The judgment sought to be reviewed is a final judgment of the Court of Appeals of the State of New York made June 4, 1954 and entered on June 28, 1954 in the office of the Clerk of the County of New York on an order of the Supreme Court of the State of New York, County of New York made June 17, 1954 on the remittitur from the Court of Appeals.

Questions Presented

The question presented is the legal and constitutional effectiveness of the McGuire Act* to permit prices fixed by resale price maintenance agreements to be enforced under State laws against sellers who are not parties to such agreements in transactions which are (a) sales directly in interstate commerce; and (b) local sales of goods which are

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* Amending 15 U. S. C. § 45 (Public Law 542, 82nd Cong. 2d Sess. (July 14, 1952), c. 745, § 2; 66 Stat. 631).

involved in and substantially affect interstate and foreign commerce.

The question may be divided as follows:

1. Whether the McGuire Act, purporting to enable state legislation permitting resale price maintenance in commerce, applies to sales and shipments directly across state lines.

2. Whether, as applied to such directly out-of-state sales and as applied to local sales of goods involved in and affecting the commerce, and particularly sales made by persons not parties to price maintenance contracts, the McGuire Act is invalid as constituting an unauthorized attempt to delegate exclusively federal legislative power to the states, and is repugnant to Article I, § 1, Article I, § 8 and Article VI of the Constitution of the United States.

3. Whether, as so applied, the McGuire Act is invalid as constituting an unauthorized attempt to enable state legislatures to sub-delegate exclusively federal legislative power to private persons acting without the control of reasonable legislatively imposed standards, and thus itself constitutes an unauthorized attempt to delegate such exclusively federal legislative power to private persons acting without the control of such standards, contrary to Article I, § 8 and Amendment V of the Constitution of the United States.

4. Whether on the facts of this case the resale price maintenance agreements in question are agreements in restraint of trade and are part of a horizontal agreement to fix prices, enforcement of which conflicts with the federal anti-trust laws.

In addition to these questions, petitioner challenges the New York statute authorizing resale price maintenance as repugnant to Article I, § 8 of the United States Constitu-

tion, to the laws of the United States regulating interstate and foreign commerce, to Article VI of the United States Constitution and to § 1 of the Fourteenth Amendment to the United States Constitution. Petitioner believes that these questions are reviewable by appeal and is filing his Notice of Appeal to obtain review of them by this Court. Petitioner respectfully requests that he may be heard on both sets of questions together.

Constitutional Provisions and Statutes Involved

The pertinent constitutional provisions involved are United States Constitution, Article I, § 1, Article I, § 8, Article VI, and Amendment V (Appendix C).

The pertinent statutes involved are the New York resale price maintenance law (General Business Law of New York, §§ 369-a-§ 369-e), commonly known as the Feld-Crawford Act, the Sherman Act (26 Stat. 209, as amended (15 U. S. C. § 1), and Section 5(a) of the Federal Trade Commission Act (38 Stat. 719, 15 U. S. C. § 45), as amended by the McGuire Act (66 Stat. 631) (Appendix D).

Statement of the Case

The Original Parties

Petitioner Sam Goody is a retailer of phonograph records. He sells these records to customers in his store in New York City, and in addition, receives orders by mail from, and ships phonograph records to, customers in all the states of the United States and in sixty-six foreign countries. Goody's mail-order business constitutes more than one-third of his entire business and his mail-order sales exceed one million dollars per year.

At the trial, respondents Raxor Corporation and Soria Sales Corporation were the only parties plaintiff. Raxor

manufactured, and Soria Sales, its wholly owned subsidiary, distributed, phonograph records sold under the trademarks "Cetra-Soria" and "Soria Series". (All questions relating to the Soria Series records have since been withdrawn from the case by respondents.) Respondents compete with other manufacturers and distributors of similar phonograph records and it is conceded that their products are, and at all pertinent times were, in the flow of interstate commerce (Record, fols. 108, 109).

On or about August 1, 1952, these respondents entered into "fair trade" contracts with retailers other than Goody stipulating the retail resale prices for their records, and gave notice of the existence of such contracts to Goody. Goody has at no time entered into a resale price maintenance contract with any of the respondents and is, in all respects, a "non-signer".

The Succession of Capitol Records, Inc. to the Original Plaintiffs' Interests

At the time of trial Cetra-Soria records were manufactured and distributed by the original plaintiffs pursuant to a contract between Raxor and an Italian firm known as "Cetra", which manufactures and sells phonograph records in Europe. Under the contract, Cetra supplied transcriptions of musical performances to plaintiffs, who then manufactured those transcriptions into phonograph records, on which they placed the trade-mark "Cetra-Soria".

Prior to the commencement of this action, a tri-partite agreement was entered into among Raxor, Cetra and Capitol Records, Inc., one of plaintiffs' competitors, under which the arrangements between Cetra and Raxor were terminated, and the rights to issue Cetra's transcriptions in the United States were granted to Capitol Records, Inc. Plaintiffs also contracted to sell to Capitol Records, Inc. their entire inventory of Cetra-Soria phonograph records, all material used in connection with the production and

marketing thereof, the trade-mark "Cetra-Soria" and the good will inherent therein and all "assignable rights" of plaintiffs under their outstanding "fair trade" contracts. The delivery of the inventory and of the intangibles was to take place not later than April 1, 1953, and with the completion of the transfer, plaintiffs were to discontinue all manufacture and sales of Cetra-Soria records and such activity was to be carried on exclusively by Capitol Records, Inc.

The Action and Trial

This action was commenced early in February, 1953. In the complaint, plaintiffs sought to enjoin Goody from selling or offering for sale phonograph records bearing the trade-marks "Cetra-Soria" and "Soria Series" at prices below those stipulated for such sale by plaintiffs' "fair trade" contracts. Capitol was not at that stage a party. In his answer, Goody raised the constitutional and federal statutory issues of which he seeks review by this petition. (Record, fols. 55-65, 68-78, 81-86, Appendix E).

Upon a motion to dismiss the complaint at the conclusion of the plaintiffs' case, petitioner also questioned the application of the rationale of *Old Dearborn Distributing Co.* v. *Seagram Distillers Corp.*, 299 U. S. 183 (1936) to the facts as developed (Record, fols. 177, 178, Appendix D).

The decision of the trial court directing judgment for the plaintiffs was filed on April 1, 1953. Before any decree was signed, petitioner moved for an order setting aside the decision and reopening the trial for the taking of additional proof relating to the transfer and delivery by Raxor to Capitol of its trade-mark "Cetra-Soria", its inventory, and its rights under the "fair trade" agreements. He sought an opportunity to show that between the time of the trial and the filing of the court's decision, the provisions of the contract between Raxor and Capitol had been performed, and that Raxor had transferred the trade-mark "Cetra-

Soria" to Capitol. These facts were conceded by plaintiffs and by Capitol, which was represented at the argument of the motion, although not by virtue of any formal appearance or submission to the jurisdiction of the court. The motion was denied.

A decree granting injunctive relief against the petitioner was entered on April 13, 1953.

Proceedings Subsequent to Decree in the Court of First Instance

An appeal from the judgment was taken to the Appellate Division of the Supreme Court of the State of New York. After the service and filing of petitioner's notice of appeal, on motion of Capitol Records, Inc. the latter was joined "as a party plaintiff, it having become the assignee of plaintiff Raxor Corporation". Petitioner appealed separately from that order on a separate record.

Upon the appeal to the Appellate Division respondents advised the Court that by reason of subsequent transactions, Capitol Records, Inc. was then the "only party in interest appearing in support of the judgment".

The Appellate Division of the Supreme Court of the State of New York affirmed, without opinion, the order joining Capitol Records, Inc. as co-plaintiff (282 App. Div. 921, 125 N. Y. S. 2d 643 [1953]). It also affirmed the judgment and the order denying petitioner's motion to reopen the trial. On the application of respondents, this order of affirmance was resettled so as to modify the judgment below by deletion therefrom, pursuant to stipulation, of reference to phonograph records bearing the trade-mark "Soria Series" and restricting the application of the judgment to phonograph records bearing the trade-mark "Cetra-Soria". By the resettled order the judgment was modified so as to enjoin petitioner from selling phonograph records bearing the trade-mark "Cetra-Soria" at prices

below the minimum retail resale prices

> "now or hereafter established for such records by or pursuant to contracts made by plaintiffs, Raxor Corporation and Soria Sales Corporation, assignors of Capitol Records, Inc. with retailers in the State of New York;"

The judgment thus permitted the prices at which Capitol's records might be sold to be fixed by contracts made by parties who were completely disinterested in the goods or in the trade-mark borne by them.

Appeal from the judgment of the Appellate Division entered on the resettled order was taken to the Court of Appeals, which affirmed, and a final judgment was entered by the Supreme Court, New York County on remittitur from the Court of Appeals.

The constitutional and federal statutory issues on which petitioner now seeks review, having been raised originally by answer and motion in the court of first instance, were renewed on each successive appeal in petitioner's briefs and were expressly passed upon by the Court of Appeals. The New York courts had recently declared they were satisfied of the general validity of the New York statute, and the issues concerning the Feld-Crawford Act were raised in other cases then before the same courts. For this reason, petitioner's briefs in the appellate courts indicated that he would not argue those aspects of his case unless a repetition of argument on these points was requested by the Court, but would confine himself to the questions which had not yet been decided. Petitioner expressly stated, however, that he did not waive those issues. They were fully presented in cases argued together with this one in the New York Court of Appeals and were expressly passed upon in the single opinion of the Court of Appeals in this group of cases. Since these grounds were sufficient to defeat in whole or in part the relief prayed for, the decision of these questions was necessary to the result reached.

Reasons for Granting Writ

Importance of the question: the choice is between a protected market and a free market

The price structure, and to a large extent, the economic life of our country, rest on two conflicting and unreconciled principles.

On the one hand we are committed by tradition and by controlling federal statute to a principle of freedom of enterprise, freedom to sell or not to sell ordinary goods in the market place at prices determined freely by the sellers' willingness to sell and the buyers' willingness to buy. We reject economic restraints that protect sellers, efficient and inefficient, against buyers, needy or not needy, and that establish controlled prices, resulting in an inflexible economic structure.

On the other hand, we recognize the claims of manufacturers to stability of their systems of distribution and of retailers to stability of their livelihood, which some feel can only be achieved by abandoning the creative but risky flexibility of a free economy. Under the influence of such thinking, some forty-five states authorized a resale price maintenance system with coercive effect on those who do not wish to join the cartel economy which such laws in ecect create. The federal legislature, in a statute (Miller-Tydings Act) which concededly did not finally resolve the matter, appeared to give some measure of countenance to these laws.

The reconciliation of these two philosophies or the choice between them is, of course, for the legislature, rather than the Court. If the state legislature, however, in an incompletely considered effort to solve a difficult economic problem, has chosen a road not open under the federal constitution and controlling federal law, or if the federal legislature has chosen a road not open under the federal

constitution, the Court must intervene to bar that way and to send the matter back for needed further study.

That is the situation today. Neither the first *Schwegmann* case, so-called,* nor the McGuire Act, enacted in response to it, has resolved the conflict, or brought needed clarity. Conflict and confusion exist. They are giving rise to a volume of litigation, and are causing widespread economic uncertainty affecting large segments of our consumers' goods market.** Such litigation and uncertainty

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* *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U. S. 384 (1951).

** The greater portion of price-fixed merchandise is so related to the commerce that the presence of a federal act is essential to the existence of any "fair trade" system under state laws. This was demonstrated immediately after the decision in *Schwegmann*. The opinion of the majority of the Court of Appeals for the Fifth Circuit in *Schwegmann Brothers Giant Super Market* v. *Eli Lilly & Co.*, 205 F. 2d 788 (1953), has not been uniformly persuasive, and the denial by this Court of certiorari in that case has not conclusively established the effectiveness of the McGuire Act.

The Supreme Court of Tennessee went so far as to sustain the denial of an injunction until the federal courts of last resort should pass upon the McGuire Act (*Calvert Distillers Corporation* v. *Robilio*, CCH 1953 Trade Cases, Par. 67,540), and on petition for rehearing following the decision of the Court of Appeals in the second *Schwegmann* case, the court on other grounds adhered to its earlier ruling, indicating nevertheless a desire for guidance from this Court with respect to a federal statute (CCH 1953 Trade Cases, Par. 67,578).

Moreover, discount houses have recently been established for the purpose of doing mail-order business from non-fair trade areas, and litigation involving the construction of the McGuire Act, if not its validity, is certain to arise. One such case is *General Electric Company* v. *Masters Mail Order Company of Washington, D. C., Inc.*, now pending in the United States District Court for the Southern District of New York (Civ. No. 93-260; CCH 1954 Trade Cases, Par. 67,827). Another is *Sunbeam Corporation* v. *Missouri Petroleum Products Co.*, in the federal District Court at St. Louis, where notwithstanding consent of the defendant to an injunction in broad terms as prayed for, the court of its own motion declined to sign a judgment involving sales across state lines without further consideration of the McGuire Act. So far as counsel are aware, a judgment has not yet been signed by the court.

will continue if this Court does not determine the effectiveness of the legislative action.

The portion of our economy directly affected is no small one. Petitioner sells over a million dollars' worth of records per year in directly out-of-state mail-order sales alone. His total sales exceed three times that amount. Many other retailers of records are affected by the same question, as are retailers of drugs, of electrical appliances, housewares, furniture and other consumer goods normally trade-marked. A well-informed observer recently estimated that discount-house sales this year will probably total at least five billion dollars*.

The intangible effects are even greater because at stake is a climate of entrepreneurial freedom in pricing or a claimate of privately protected and controlled mark-up and margin of profit.

That the issue is vital is plainly shown by the debates on the McGuire Bill itself. These debates are aptly reflected in H. R. Rep. No. 1516 (82nd Cong., 2nd Sess.) on H. R. 6925, a predecessor of the McGuire Bill. The Report acknowledges that there was a "plethora of close, complex, and weighty arguments advanced by those who approve, in practice and theory, resale price maintenance". It quotes with approval a pro "Fair Trade" declaration that the *Schwegmann* decision had

> "brought both the retail and manufacturing industries of the United States to the most critical and dangerout test of our system of distribution that we have faced for more than two decades. This action has brought fear, mistrust and panic into the market, and

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* Herbert Brean, *Discount Houses Stir Up a $5 Billion Fuss, They Do It By Offering Cut Prices With Little Or No Service While Others Provide the Traditional Extras at List Price. Competition Between The Two May Revolutionize U. S. Retailing,* LIFE, Volume 37, No. 6, page 52 at 53 (August 9, 1954).

raised the specter of mass bankruptcy to help disorganize the systems of production and distribution which are the cornerstones of the American way of life."

The minority views on H. R. 6925, on the other hand, referred to "the serious consequences to our competitive economy resulting from resale price maintenance legislation" and concludes: "We can see resulting from this type of legislation only a morass of chaos and confusion."

Both sides warmly agree on the vital importance of the dispute and, again, it is clearly not the task of this Court to decide which side has the greater wisdom. It is the function of this Court, recognizing the importance of the problem, when serious constitutional and federal statutes and issues are raised, to resolve them and not leave a damping uncertainty. This Court, we believe, recognized the significance of the issues in this case when it granted certiorari* in *Sunbeam Corp* v. *Wentling,* 185 F. 2d 903 (CCA 3, 1950), although it was prevented from considering those issues by the intervening broader decision in *Schwegmann.*

The weakness of the system of resale price maintenance authorized by state statutes was established in the light of the Sherman Act by *Schwegmann.* The proponents of resale price maintenance succeeded in obtaining what was characterized as an emergency correction of the *Schwegmann* case in the McGuire Act, amending the anti-trust laws.

The question now presented is whether the McGuire Act has, and whether it constitutionally can have, the effects its proponents hoped for it. We submit that it does not have these effects and cannot have them.

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* 341 U. S. 944 (1951).

The McGuire Act is not intended to apply to the directly out-of-state sales involved here

We examine first the intention and effect of the McGuire Act, assuming its constitutionality.

In *Calamia* v. *Goldsmith Bros., Inc.*, 299 N. Y. 636 (1949), remittitur amended 299 N. Y. 795 (1949), New York asserted the power to apply its resale price maintenance system to sales of goods in interstate commerce, evidently in the sense that the goods had moved into the State of New York and were sold there. In the present case, New York asserts power to apply its resale price maintenance system to directly out-of-state sales made by a citizen of New York. If each of the states has a similar power to regulate both sales of goods moving into the state and sales of goods moving out of the state an absurd situation would be reached, for the regulations of the various states are by no means of a uniform pattern, and potentially the laws as well as prices may be at total variance.* This is not what the Congress intended. It did not contemplate determinations based on the place of technical passage of title and individual variations in terms of sale, nor the problems of extraterritorial enforcement of state laws, nor the jurisdictional difficulties presented by the activities of an out-of-state retailer. Obviously it was not attempting to deal with the situation which would unavoidably have raised these problems. The Congress intended by an

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* Sales to public libraries are expressly exempt from the operation of the New York statute, but not from that of the Connecticut "Fair Trade" law. Which law governs a sale through the mails by a New Haven bookseller to a New York public library?

Packaged ham is within the scope of New York's statute, but not of Virginia's. If New York law is applied to the sale and shipment of a ham by a Virginia seller to a New Yorker, a real burden is thrown on the citizen of Virginia. But if Virginia law is applied, citizens of New York are placed at a competitive disadvantage.

Conceivably, also, the price fixed by a distributor in one state may differ from that established by the manufacturer or another distributor elsewhere.

enabling act to remove the interdiction of the Sherman Act disclosed by *Schwegmann* to the enforcement of the New York statute with respect to non-signers in the state of facts typified by *Calamia* v. *Goldsmith Bros., Inc.*, where the last sale is purely local.* It also intended to embrace in the exemption "stipulated" as well as "minimum" resale prices, and to permit manufacturers to require the entry by distributors into further price maintenance agreements, on which points the Miller-Tydings Act is silent. But it did not intend to treat the problem with which this petition is concerned.

Where directly out-of-state sales are involved, the application of the retail price maintenance system of the seller's state encountered two obstacles prior to the McGuire Act—First, the doctrine of *Sunbeam Corp.* v. *Wentling*, 185 F. 2d 903 (CCA 3, 1950), and secondly, the *Schwegmann* case. Wentling pointed out a constitutional obstacle peculiar to the directly out-of-state sale. *Schwegmann* applied generally to sales of goods which in the broad sense are "in commerce", and thus foreclosed the narrower questions raised by *Wentling* (341 U. S. 944 [1951]). When the McGuire Act in effect undertook to overcome the decision in *Schwegmann*, whether effectively or not, it left the obstacle of *Wentling*. This is not speculation. The principal proponents of the legislation expressly advised the Congress that the bill as written did not cure this problem, and some offered amendments which they felt would meet it.** The amendments were rejected and the bill passed without them. Thus, the Congress, with eyes open, chose to pass a bill which

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* For example, Senator Humphrey at 98 Cong. Rec. 8738-9, 8872 (1952).

** For example, Hearings before the House Interstate and Foreign Commerce Committee on H. R. 5767, 82nd Cong., 2d Sess., pp. 109, 110, 143-4, 148, 177-9, 221-2; Hearings before the Anti-Trust Sub-Committee of the House Committee on the Judiciary on H. R. 4365, 4592, 4662 and 6367, 82nd Cong., 2d Sess., pp. 354, 357-8.

did not embrace the directly out-of-state sale, and deliberately refrained from establishing a federal system or means of enforcement for the maintenance of resale prices of goods moving in interstate commerce, which would have alleviated any threats to state policy by virtue of federal supremacy in the case of directly interstate movement.

Some remarks in the legislative history show that some of the proponents of the bill thought they had dealt with the *Wentling* situation.* But read in the context these passages show that they did not contemplate the constitutional impact upon the directly out-of-state aspect of the case.

From the point of statutory language, the only provision of the Act thought to touch upon *Wentling* is Section 4. But this section does not purport to treat directly interstate sales. Section 4 merely provides that the making of a contract, as described in section 2, and the enforcement of rights of action, including rights of action against non-signers, as described in section 3, shall not constitute an unlawful burden or restraint upon or interference with interstate commerce. Since neither section 2 nor section 3 deals with the directly out-of-state sale, it is obvious that section 4 does not do so either.

Even if there existed a design to abdicate in favor of the states the power of the Congress to regulate transactions which directly and substantially affect the commerce, the absence of a constitutional inhibition would not foreclose all further questions. Surely the words of Section 4 may hardly be described as being so explicit in this respect as to leave no doubt of the accomplishment of that

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* So the House Committee Report (82nd Cong., 2d Sess., Report No. 1437, p. 2). But Senator Schoeppel stated that even here the bill merely referred to policies within state borders, including transactions in which goods "have moved in interstate commerce" (98 Cong. Rec. 8869 [1952]).

design. Moreover, since the Congress altered no facts, it must then have attempted to control the finding of facts or conclusions to be drawn from facts by the judicial branch, and this not merely with respect to the interpretation of federal anti-trust laws, but in the field of the relation of state legislation to the Constitution.

Thus, if the intention of the Congress exceeded the limits for which petitioner contends, appropriate means of expressing it and of carrying it out have not been utilized. Federal control might have answered the purpose. In the McGuire Act the Congress has, to the extent of its power, rejected *Schwegmann*, but it has not effectively provided for the distinctive aspect of *Wentling*. The legislative history shows the failure to do so was a deliberate compromise believed necessary to avoid the defeat of the bill.*

The rule of the Benjamin Case does not apply to the McGuire Act

We come now to the constitutional validity of the McGuire Act.

If the power of the Congress to permit state legislation to govern what is peculiarly interstate commerce is unrestrained, and the wording of the statute be sufficiently explicit as a surrender of the plenary power of the Congress, that is an end of one branch of our case. Our position is that there is an area in which the Congress may choose to adopt or to authorize state control over matters which are, broadly speaking, interstate commerce, but that there is also an area which the Constitution confers upon the Congress and which the Congress must assume. The Constitution itself, not merely Congressional intent,

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* For example, Hearings before the Senate Interstate and Foreign Commerce Committee on H.R. 5767, 82nd Cong. 2d Sess., pp. 86, *et seq.*

precludes certain forms of state interference with interstate commerce. This question is an important one and we believe that certain seemingly conflicting declarations in opinions dealing with other matters call for authoritative settlement of the question. Without attempting here to offer a final definition of the area where such limitations apply, we suggest that in relation to directly interstate sales, regulations of the states which impose or may impose undue and discriminatory burdens are invalid and the Congress lacks power to authorize such regulation. *Prudential Co* v. *Benjamin*, 328 U. S. 408 (1946) is relied on as establishing the contrary position. We do not believe that is the significance of the *Benjamin* decision.

There, in sustaining the validity of the McCarran Act, this Court pointed out that in the perplexing problems of adjustment between state and federal power:

> "No phase has had a more atypical history than regulation of the business of insurance. This fact is important for the problems now presented. They have origin in that history. Their solution cannot escape its influence." (328 U. S. at 413)

It is in the light of these very exceptional circumstances, stressed by the Court's opinion as crucial, that *Benjamin* is to be read. The case deals with an area which has been traditionally regarded not only as subject to concurrent federal and state power, but indeed subject to state power alone until the decision in *United States* v. *Southeastern Underwriters Ass'n.*, 322 U. S. 533 (1944).

As is shown in the companion case of *Robertson* v. *California*, 328 U. S. 440 (1946), decided the same day as the *Benjamin* case, the interstate insurance business is a subject matter which the states could regulate even apart from the McCarran Act. Interstate resale price maintenance, on the other hand, is a subject matter which the *Schwegmann* and *Wentling* cases showed to be beyond the

power of the states unless the McGuire Act confers the power.

Although, in *Benjamin*, the Court *arguendo* assumed that the state tax would be discriminatory in the sense there contended, it expressly held that the tax involved demonstrably did not tend to exclude the Prudential Company from competition with local business (328 U. S. at 432). The New York "Fair Trade" Act, if applied to directly interstate transactions, plainly would discriminate against interstate sellers in favor of local dealers in states where the established prices are lower or the same or where there are no established prices.

The *Benjamin* case thus has no bearing on the separate line of authority represented by *Wentling*, which excludes state action over that which is primarily and directly interstate. In that area, we believe, the principle that the states may not regulate and Congress may not delegate regulation to the states, remains unimpaired. In this connection, it is significant that the Court, in the *Benjamin* case, declared

> "That the [commerce] clause imposes some restraint upon state power has never been doubted." (328 U. S. at 418)

The field in which such restraint is imposed by the direct force of the constitutional provision is, of course, not there defined, but we believe that it includes those cases of sales which are directly interstate in character rather than primarily local and only incidentally interstate.

We believe the principle still sound that

> "Congress cannot transfer its legislative power to the States—by nature this is non-delegable." *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 164 (1920), citing *In re Rahrer*, 140 U. S. 545 (1890) and other cases.

The McGuire Act is not a permissible enabling Statute

The delegation attempted here is essentially different from that adopted in the familiar enabling statutes relating to liquor, prison-made goods and the like.* In none of these cases has a Congressional consent to state regulation of that which is directly interstate been sustained. In each case where interstate commerce in specified goods is prohibited, it is the Congress which has prohibited it. In enacting the McGuire Bill, the Congress deliberately refused to take this course.**

It sought instead to delegate its authority to the states. Petitioner believes it may not properly do so.

It sought further to delegate to the states authority in turn to abdicate determinations in favor of private persons. Petitioner believes it may not properly do so.***

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* Viz., Webb-Kenyon Act, 37 Stat. 699, 27 U. S. C. § 122; Hawes-Cooper Act, 45 Stat. 1084, 49 U. S. C. § 60; Lacy Act, 31 Stat. 188, 187, 53 Stat. 1433, 16 U. S. C. §§ 668d, 701; Renovated Butter Act, 32 Stat. 193, 21 U. S. C. § 25.

** "This provision does not establish a Federal fair-trade policy. Like H.R. 5767 in its entirety paragraph 4 simply recognizes the rights of States to establish and carry out policies to restrain unfair competition as they define it within their own borders including transactions in which goods have moved in interstate commerce * * *. Amendments have been proposed to H.R. 5767 which seek to meet the Wentling decision by an approach which it is believed would establish a Federal fair-trade policy and a Federal cause of action. It is significant that the House Interstate and Foreign Commerce Committee, the House of Representatives, and the Senate Interstate and Foreign Commerce Committee did not find these amendments acceptable." (Senator Schoeppel, 98 Cong. Rec. 8869-70 [1952].)

Representative McGuire took the same limited view of the purpose of his bill (98 Cong. Rec. 4979 [1952]).

*** The question of improper delegation of legislative authority in "Fair Trade" statutes has never been passed upon by this Court. It was a specific ground for the declaration of the unconstitutionality

(*Footnote continued on following page*)

It sought, on the other hand, to encroach on the judicial prerogative by making a legislative determination as to what is a burden on interstate commerce within the meaning of the United States Constitution. The courts, petitioner believes, alone can make that determination.

We do not argue here, but if heard shall show further, that on the special facts of this case, the agreements sought to be enforced constitute a horizontal arrangement and in any event violates the anti-trust laws. Further we shall show that on the facts of this case the trade-mark rationale, which is the only possible basis for validity of a resale price maintenance system, is wholly absent.

Conclusion

Your petitioner prays that for the foregoing reasons, his petition for a writ of certiorari to the Supreme Court of the State of New York, County of New York, be granted.

Respectfully submitted,

ABRAHAM M. LOWENTHAL,
Attorney for Petitioner,

LEON G. TELSEY,
MALCOLM S. MASON,
Counsel.

(*Footnote continued from preceding page*)

of the Nebraska "Fair Trade" Act as to non-signers (*General Electric Co.* v. *J. L. Brandeis & Sons* [District Court of Nebraska], CCH 1954 Trade Cases, Par. 67,682) and appears to have been an element in the similar determination of the Supreme Court of Florida with respect to the 1939 act of that State (*Liquor Stores, Inc.* v. *Continental Distilling Corp.*, 40 So. 2d 371 (1949), not officially reported) and the non-signer provisions of the 1949 act (*Miles Laboratories, Inc.* v. *Eckerd*, CCH 1954 Trade Cases, Par. 67,700).

Certificate

This is to certify that copies of this petition have been served on counsel for respondents on the 1st day of September, 1954.

s/ ABRAHAM M. LOWENTHAL.

APPENDIX A

Opinions of the Court of Appeals and the Trial Court

STATE OF NEW YORK,
COURT OF APPEALS.

No. 76

GENERAL ELECTRIC COMPANY,
Respondent,

v.

MASTERS, INC.,
Appellant.

No. 77

THE LIONEL CORPORATION,
Respondent,

v.

S. KLEIN ON THE SQUARE, INC.,
Appellant.

No. 75

RAXOR CORPORATION and SORIA SALES CORPORATION,
Plaintiffs-Respondents,

and

CAPITOL RECORDS, INC.,
Joined as Co-Plaintiff-Respondent,

v.

SAM GOODY,
Defendant-Appellant.

FROESSEL, J.:

We are again confronted with an attack upon the so-called Feld-Crawford "Fair Trade Law" (General Busi-

ness Law, § 369-a et seq., L. 1935, ch. 976, re-enacted L. 1940, ch. 195). This statute first came before us for review in *Doubleday, Doran & Co.* v. *Macy & Co.* (269 N. Y. 272), decided January 7, 1936, wherein plaintiff Doubleday sought to enjoin Macy, a nonsigner of its fair trade agreements, from selling three of plaintiff's books at less than their stipulated fair trade prices. We held that the "nonsigner" provision was unconstitutional, because by its means the Legislature was indirectly fixing prices, a result which it could not, absent special circumstances, accomplish directly.

Exactly eleven months later, the Supreme Court of the United States reviewed a similar statute enacted in Illinois, the validity of which was attacked "upon the grounds that it denies due process of law and the equal protection of the laws in violation of the Fourteenth Amendment". Rejecting these contentions, the Supreme Court held that the statute was not "so arbitrary, unfair or wanting in reason as to result in a denial of due process", that it did not constitute an unlawful delegation of legislative power, and that it satisfied the test of equal protection of the laws guaranteed by the Fourteenth Amendment (*Old Dearborn Co.* v. *Seagram Corp.*, 299 U. S. 183).

Almost immediately thereafter, the New York statute was again before us in *Bourjois Sales Corp.* v. *Dorfman* (273 N. Y. 167). This time, relying on the *Old Dearborn* decision, we upheld the statute against claims that it violated the *New York State* Constitution. Indeed Chief Judge Crane, who wrote for the court in *Doubleday* as well as the *Bourjois* case, said in the latter (p. 172): "Had the *Seagram* [*Old Dearborn*] case been decided before argument in the *Doubleday* case we certainly would have followed the Supreme Court's ruling on the Federal Constitution. We do so now". The statute has since been considered and applied by us in at least four cases (*Port*

Appendix A

Chester Wine & Liquor Shop v. *Miller Bros. Fruiterers*, 281 N. Y. 101 [retailer's right of action]; *Guerlain, Inc.* v. *Woolworth Co.*, 297 N. Y. 11, certiorari denied 332 U. S. 837 [rebottling of perfumes]; *Calamia* v. *Goldsmith Bros.*, 299 N. Y. 636, remittitur amended 299 N. Y. 795 [cigars in interstate commerce]; and *Bristol-Myers Co.* v. *Picker*, 302 N. Y. 61 [trading stamps as price cutting]), in all of which invalidity of the law under the New York State Constitution was urged upon us by the parties, but rejected.

In each of the three cases now before us, the defendant, a nonsigner of the plaintiff's fair trade agreements, has been enjoined from selling plaintiff's fair traded products at less than their stipulated minimum prices. All of the transactions in issue involve interstate commerce either directly or indirectly, and, since in large measure the issues presented by the three cases are identical, they shall be discussed together, insofar as possible.

Defendants' principal attack is directed toward the constitutionality of the Feld-Crawford Act. They argue that the statute constitutes an unlawful delegation of legislative powers to private persons in violation of section 1 of article III of the New York State Constitution, a deprivation of property without due process of law and a denial of equal protection of the laws in violation of both the New York State and Federal Constitutions, particularly the former.

Seventeen years ago we disposed of the delegation of power and due process arguments in the *Bourjois* case (*supra*). Even though our opinion did not separately and specifically discuss those issues as arising under the State Constitution, they were actually presented and argued to our court, were necessarily disposed of by our decision there, and are therefore no longer open to question.

Defendants' economic and policy arguments concerning the doubtful wisdom of fair trade laws have been urged

before the courts over and over again. They were reviewed in the *Old Dearborn* case (*supra*, pp. 195-196), and, as was there said, "Where the question of what the facts establish is a fairly debatable one, we accept and carry into effect the opinion of the legislature"; its determination "is conclusive so far as this court is concerned" (p. 196). Such contentions are properly addressed to the Legislature; they do not alone provide sufficient reason for us to reopen settled constitutional issues.

Nor is there merit to defendants' contention that the statute denies equal protection of the laws. In the *Old Dearborn* case (*supra*) the equal protection argument which was there raised against the Illinois fair trade statute was summarily rejected by the Supreme Court in its holding (p. 197): "Clearly, the challenged section of the Illinois act *satisfies this test*" (emphasis supplied). In the present case, moreover, the statute creates no unreasonable or arbitrary discrimination against low cost, minimum service retailers, as defendants contend. The statute itself does not purport to create any such distinction or classification. Its provisions are wholly inapplicable to unmarked goods. As to marked goods, it merely permits a manufacturer, whose trade-mark or brand name may represent a large advertising investment and a carefully nurtured good will, to prevent retailers, over whom he would otherwise have little control, from seriously impairing the value of that trade-mark and good will by reselling his identified products at unreasonably low prices. Finally, we have already held that this statute constitutes a reasonable regulation under the police power (*Bourjois* case, *supra*).

Defendants now present a new constitutional challenge by attacking the Maguire Act (66 U. S. Stat. 632, U. S. Code, tit. 15, § 45), which was enacted following the recent decision in *Schwegmann Bros.* v. *Calvert Corp.* (341 U. S. 384). That act exempts from the Federal antitrust laws

fair trade agreements made pursuant to existing or future State laws, and permits their enforcement against nonsigners as well as signers who are engaged in interstate commerce. Defendants argue that this enactment gives to the States power over interstate commerce which is denied them under the Federal Constitution.

Beginning with the familiar distinction between commerce which, while primarily local, indirectly affects interstate commerce, and that which is directly of national concern, defendants claim that the latter type of commerce is, by virtue of the Constitution, *exclusively* within the power of Congress, and cannot under any circumstances be regulated by the States. However, this basic distinction is drawn merely to determine the extent of State power in those areas where Congress by its silence has permitted its own power to remain dormant. The distinction does not, as defendants contend, restrict the power of a State acting, as here, under an express grant by Congress (*Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408, 421-423). As the Supreme Court said in *Southern Pacific Ry. Co.* v. *Arizona* (325 U. S. 761, 769): "Congress has undoubted power to redefine the distribution of power over interstate commerce. It may * * * permit the states to regulate the commerce in a manner which would otherwise not be permissible [citations]".

It is true that in *Schwegmann Bros.* v. *Calvert Corp.* (*supra*) the Supreme Court held that by the Miller-Tydings amendment (50 U. S. Stat. 693, U. S. Code, tit. 15, § 1), which exempted from the Sherman Antitrust Act only "contracts or agreements", Congress did not demonstrate an intent to permit fair trade "compulsion" against nonsigners of those agreements. However, the court did not in its opinion indicate that such "compulsion", if expressly authorized by Congress, would transgress any constitutional prohibition; indeed, the decision contains clear implications to the contrary. The Maguire Act now au-

thorizes such "compulsion", and its constitutionality has been upheld by the United States Court of Appeals for the Fifth Circuit in *Schwegmann Bros. Giant Super Markets* v. *Eli Lilly & Co.* (205 F. 2d 788), a decision which the Supreme Court twice refused to review (certiorari denied 346 U. S. 856, rehearing denied 346 U. S. 905).

Nor should we for this purpose distinguish between transactions affecting interstate commerce, as in the *General Electric* and *Lionel* cases herein, and those directly in interstate commerce, such as the mail-order sales of the *Raxor* case. Just as in the Feld-Crawford Act, where no distinction is drawn between interstate and local commerce, so the language of the Maguire Act makes no discrimination between sales of goods affecting, and sales directly in, interstate commerce. On the contrary, the purpose of that Federal statute, as expressed by Congress in its preamble thereto, was to permit State fair trade laws to apply to commodities, contracts and activities "in or affecting" interstate commerce. Furthermore, the case of *Sunbeam Corp.* v. *Wentling* (185 F. 2d 903, revd. 341 U. S. 944, mod. 192 F. 2d 7), on which defendants rely so heavily in this connection, was decided prior to the Maguire Act's enactment. That the statute was designed to alter the *Wentling* rule so as to open all interstate commerce to the operation of State fair trade acts, appears from the statutory language as aforesaid, from its legislative history and from judicial decision (*Sunbeam Corp.* v. *MacMillan*, 110 F. Supp. 836).

Defendants further contend that the Feld-Crawford Act was never originally intended by our Legislature to apply to resale price maintenance as against nonsignatories engaged in interstate commerce, and that without re-enactment after passage of the Maguire Act it cannot be so applied. But the case of *People* v. *Bootman* (180 N. Y. 1), on which defendants rest this argument, is inapplicable

here. True, we there held that without re-enactment after passage of the Congressional enabling statute, our State Fish and Game Law was not applicable to interstate game. But there, we had previously held that the statute in question was intended to apply only to *local* game (*People* v. *Buffalo Fish Co.*, 164 N. Y. 93).

In the instant cases, however, instead of having, by prior decision, limited the Feld-Crawford Act to local commerce, we have squarely held that the statute applies to non-signatories in *interstate* commerce (*Calamia* v. *Goldsmith Bros., supra*). Although such application was later declared unconstitutional in *Schwegmann Bros.* v. *Calvert Corp.* (*supra*), passage of the Maguire Act in 1952 removed the final barrier to complete interstate application of the New York statute. Under such circumstances it has long been well established that the Constitution does not require a State statute to be re-enacted in order to be effective (*Matter of Rahrer*, 140 U. S. 545; *Central Pacific R. R. Co.* v. *Nevada*, 162 U. S. 512; *Tua* v. *Carriere*, 117 U. S. 201; 1 Sutherland on Statutory Construction [3d ed.], § 2027).

Each of the defendants contends that its plaintiff's fair trade contracts do not comply with the provisions of section 369-a of the General Business Law. We have examined these contracts separately, and find on the records before us that in each case there were in existence fair trade contracts which did comply with that part of the statute which sanctions such contracts between "vendor" and "buyer".

Numerous other contentions have been raised by one or more of the defendants. We have carefully considered each of them and find them to be without merit.

The judgment in each case should be affirmed, with costs.

Lewis, Ch. J., Conway, Desmond, Dye and Fuld, JJ., concur; Van Voorhis, J., taking no part.

In each action: Judgment affirmed.

Appendix A

SUPREME COURT—SPECIAL TERM,

PART X.

By HON. ISIDOR WASSERVOGEL,
SPECIAL REFEREE.

Raxor Corp'n and ano. v. Goody—Plaintiffs seek to enjoin defendant, pursuant to the provisions of the Feld-Crawford Act (General Business Law, sec. 369-a, et seq.) from selling phonograph records manufactured and distributed by them at prices less than minimum retail-resale prices established therefor by "fair-trade agreements" entered into by plaintiffs with retailers other than defendant.

The essential facts are undisputed. Plaintiff Raxor Corporation (hereinafter referred to as Raxor) manufactures phonograph records of which plaintiff Soria Sales Corporation (hereinafter referred to as Soria) is the exclusive wholesale distributor. Upon the trial of this action, defendant conceded that the phonograph records made and distributed by plaintiffs are in fair and open competition with others of the same general class and that he, with knowledge of the fact that their product was fair-traded, regularly and repeatedly advertised and offered these phonograph records for sale at prices lower than those specified in plaintiffs' fair-trade agreements.

Defendant's answer sets forth eight separate affirmative defenses, which may be briefly stated as follows: 1. The complaint does not state a cause of action. This defense is without merit. 2. The fair-trade agreements made by plaintiffs do not comply with the provisions of the Feld-Crawford Act (supra). 3. This action was commenced and is maintained in furtherance of an illegal contract, agreement or combination among plaintiffs and one or more manufacturers and distributors of competing phonograph

records to fix and maintain retail-resale prices, in violation of article 22 of the General Business Law. 4. The alleged contract, agreement or combination among plaintiffs and one or more manufacturers and distributors of competing phonograph records violates the Sherman Anti-Trust Act and constitutes an unlawful method of competition under the Federal Trade Commission Act. 5. The Feld-Crawford Act is unconstitutional and void. 6. Plaintiffs, in the operation of their resale price maintenance system, eliminate or suppress competition between retailers in violation of the Sherman Anti-Trust Act. 7. The Feld-Crawford Act places an unconstitutional burden upon and discrimination against interstate commerce in violation of section 8, Article I of the United States Constitution; and to the extent that the Miller-Tydings Amendment (15 U. S. C., 1) and the Federal Fair Trade Act (McGuire Act, July 14, 1952, 66 Stat. 632, 15 U. S. C., 45) purport to sanction plaintiffs' resale price fixing policy, these statutes are unconstitutional. 8. The Feld-Crawford Act does not apply with respect to defendant's sales of phonograph recordings directly in interstate and foreign commerce.

In view of the recent decision of the Appellate Division, First Department, in General Electric Co. v. Masters, Inc. (February 25, 1953, 129 N. Y. L. J., 619, affirming 128 N. Y. L. J., 1475, December 12, 1952), defendant's second, fifth, sixth and seventh defenses must be deemed insufficient as a matter of law. The issues to be determined by the court, therefore, are narrowed down to the defenses wherein it is, in effect, contended that relief is barred to plaintiffs by reason of their alleged horizontal agreements (third and fourth defenses, supra), and the eighth partial defense that price cutting in interstate sales may not be enjoined pursuant to the provisions of the Feld-Crawford Act.

Appendix A

Contrary to the contentions of the defendant, as set forth in the third and fourth defenses, nothing in the record indicates that this action was commenced either pursuant to or in furtherance of an illegal contract, agreement or combination among plaintiffs and any other competing manufacturers or distributors of phonograph records. The evidence adduced upon the trial fails to show the existence of any combination between plaintiffs and any other manufacturer or distributor in the advertisement, promotion or sale of plaintiffs' product. The credible testimony establishes that Raxor has entered into a contract to sell to Capitol Records, Inc., its inventory of the trade-marked phonograph records here involved, such sale to be effective as of March 31, 1953. Raxor has further agreed thereby to transfer its trade-mark and assignable rights in the fair-trade agreements with respect to such phonograph recordings to Capitol Records, Inc., on or before April 1, 1953. There is nothing in this contract which supports defendant's claim of illegality. The transfer of the intangible rights in the fair-trade agreements is merely a reasonable incident to the agreement by Raxor to assign its trade-mark to Capitol Records, Inc. At most, the provisions of the contract cited by defendant in support of its position are the usual, reasonable and necessary safeguards to protect a business between the date of a contract for its sale and the actual consummation of such sale and transfer. It is significant that the contract between Raxor and Capitol Records, Inc., contains no commitment by either party as to the prices at which the phonograph records were to be sold at any particular time. Raxor's agreement that between the date of the contract and the date of the final transfer it would sell its albums only "in the regular course of business" embodies no unreasonable restraint of trade which is interdicted by any of the statutes cited by defendant. Neither does such agreement compel Raxor to

maintain its fair-trade practice pending the consummation of the sale or prohibit its freedom to change the established retail resale prices. The mere fact that plaintiffs are to retain their interest in the trade-mark only for a short period of time is insufficient as a basis to infer therefrom any illegal intent by their entry into the contract to dispose of same on or before an imminent fixed date.

Defendant also claims that Raxor's agreement with one Cetra, an Italian corporation, establishes a price-fixing policy on a horizontal basis and therefore, bars the relief which plaintiffs seek in this action. No such inference of illegality can be drawn from an analysis of the agreement between Raxor and Cetra. The record shows that Cetra furnishes to Raxor transcriptions of musical performances recorded in Italy of which Raxor, by contract with Cetra, has the right to issue recordings of those performances in the United States and certain other specified territories. The only reference to price in the contract between these two corporations is that the Cetra recordings are to be "merchandised and distributed on a competitive basis with quality labels * * *." Contrary to defendant's contention, this provision does not create an agreement to fix prices or retail resales. Moreover, assuming, arguendo, that the contract between Raxor and Cetra does establish a price-fixing policy, the record adduced upon the trial nevertheless, is barren of any proof that there is competition between these two corporations. The mere fact that they may make and sell phonograph recordings of the same and/or similar performances in different parts of the world is not sufficient to establish proof of any competition and, consequently, an illegal horizontal agreement. It necessarily follows, therefore, that defendant's third and fourth defenses cannot be sustained.

Defendant, by its eighth partial affirmative defense, in effect, denies the power of the State of New York to promulgate legislation affecting direct interstate mail order

sales. It is also defendant's contention that the McGuire Act (supra) does not and cannot authorize the application of state fair-trade laws to such interstate sales. Neither position advocated by defendant is tenable. The explicit intent of Congress to authorize the application of state legislation to interstate transactions is evident in the clear language of the purpose of the McGuire Act as set forth in section 1 thereof, to wit: "* * * It is the further purpose of this Act to permit such (state fair trade) statutes, laws and public policies to apply to commodities, contracts, agreements and activities *in or affecting interstate or foreign commerce*" (italics added; see also 98 Cong. Record 9123, Sen. Schoeppel, State of Kansas; Sunbeam Corp'n v. MacMillan, C. C. H. 1953 Trade Cases, paragraphs 67, 451).

As to the application of the Feld-Crawford Act to interstate sales, this court has previously held such statute applicable to sales made by a retailer to consumers in other states (Emerson Radio & Phonograph Corp's v. Standard Appliances, Inc., 201 Misc., 821; see also Calamia v. Goldsmith Brothers, Inc., 82 N. Y. S., 2d, 277; affirmed 277 App. Div. 884; affirmed 299 N. Y., 636, remittitur amended 299 N Y., 795, 796). Concededly, as defendant notes, neither of the above cited cases concerned *direct* mail order sales. Nothing, however, in the language of the Feld-Crawford Act or in any of the decisions brought to the attention of the court, affords sufficient basis at this time to make a distinction between the sale of goods "in the flow of interstate commerce," which defendant admits is within the intendment of the statute and "direct interstate sales," which he claims are without its scope (Rothbaum v. R. H. Macy & Co., 280 App. Div., 530).

The court is aware that the supposed lack of power of a state to reach direct interstate sales prior to the passage of the McGuire Act now raises serious questions as to the

constitutionality of the federal statute as well as the State Fair-Trade Law. However, inasmuch as counsel for both sides herein have indicated their intention to obtain a ruling by a higher tribunal and particularly in view of the long line of decisions in the courts of this state, commencing with Bourjois Sales Corporation v. Dorfman (273 N. Y., 167), which held the Feld-Crawford Act to be constitutional, I am of the opinion that the subsequent problems as to the constitutionality of this statute and federal fair trade policy which have been raised by recent legislation and judicial opinion, are best reserved for the determination of an appellate court.

Judgment is rendered for plaintiffs as prayed for in the complaint. No damages or costs are awarded.

Submit decree within ten days on three days' notice.

The above constitutes the decision of the court as required by section 440 of the Civil Practice Act.

APPENDIX B

Judgment of the Supreme Court of the State of New York as modified by the Appellate Division, First Department, and, as so modified, affirmed by the Court of Appeals of the State of New York

(N. B. Modification deleted matter shown below in brackets and added italicized matter.)

At a Special Term, Part X of the Supreme Court of the State of New York, held in and for the County of New York, at the County Court House in the Borough of Manhattan, City of New York on the 13th day of April, 1953.

Present:

HON. ISIDOR WASSERVOGEL,
Special Referee.

No. 1513-1953 Judgment.

RAXOR CORPORATION and SORIA SALES CORPORATION,
Plaintiffs,

against

SAM GOODY,
Defendant.

The parties hereto having consented that the trial of this action be referred to Hon. Isidor Wasservogel, Special Referee, to be heard and determined by him, and the action having been duly tried before the said Hon. Isidor Wasservogel, Special Referee, at Special Term, Part X of the Supreme Court on the 2nd day of March, 1953, and the

plaintiffs having appeared by Rosenman Goldmark Colin & Kaye, Esqs., their attorneys (Ambrose Doskow, Esq., of counsel), and the defendant having appeared by Telsey Lowenthal Rothenberg & Mason, Esqs., his attorneys (Abraham M. Lowenthal, Esq., of counsel), and the Court having heard the allegations and proofs of the parties, and the parties having waived the making of separate findings of fact and conclusions of law, and the Court having duly made its decision as required by the Civil Practice Act,

Now, on motion of Rosenman Goldmark Colin & Kaye, attorneys for plaintiffs, it is

ORDERED, ADJUDGED AND DECREED that defendant, his agents, employees and all persons acting under the authority or control of defendant and all persons acting in privity or concert with defendant, be and they hereby are perpetually enjoined and restrained from advertising, offering for sale or selling any phonograph records bearing the trade-mark, brand or name "Cetra-Soria [or "Soria Series"] at prices below the minimum retail resale prices now or hereafter established for such records by or pursuant to contracts made by plaintiffs, *Raxor Corporation and Soria Sales Corporation, assignors of Capitol Records, Inc.*, with retailers in the State of New York; and it is further

ORDERED, ADJUDGED AND DECREED that neither party shall recover against the other any damages or costs herein.

(s) ISIDOR WASSERVOGEL
Special Referee

(s) ARCHIBALD R. WATSON
Clerk

APPENDIX C

The Constitution of the United States

Article I.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 8. The Congress shall have Power * * *

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes; * * *

Article VI.

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. * * *

Amendment V.

No person shall * * * be deprived of life, liberty, or property, without due process of law; * * *

APPENDIX D

The Feld-Crawford Act

(L. 1935, c. 976, as repealed and reenacted by L. 1940, c. 195, as amended by L. 1941, c. 39, § 38; Sections 369-a, *et seq.* of the General Business Law of the State of New York)

§ 369-a. *Price fixing of certain commodities permitted.* 1. No contract relating to the sale or resale of a commodity which bears, or the label or content of which bears, the trade mark, brand, or name of the producer or owner of such commodity and which is in fair and open competition with commodities of the same general class produced by others shall be deemed in violation of any law of the state of New York by reason of any of the following provisions which may be contained in such contracts:

(a) That the buyer will not resell such commodity except at the price stipulated by the vendor;

(b) That the vendee or producer require any dealer to whom he may resell such commodity to agree that he will not, in turn, resell except at the price stipulated by such vendor or by such vendee.

2. Such provisions in any contract shall be deemed to contain or imply conditions that such commodity may be resold without reference to such agreement in the following cases:

(a) In closing out the owner's stock for the purpose of discontinuing delivering any such commodity.

(b) When the goods are damaged or deteriorated in quality, and notice is given to the public thereof.

(c) By any officer acting under the orders of any court.

3. This article shall not be deemed or construed to apply to, or to fix or limit prices at which any commodity may be sold or offered for sale to the state of New York or to any administrative department of the state government, to any political subdivision of the state, to any municipality, to any public corporation or authority now or hereafter created by the legislature, to any college or university library or any public library incorporated by an act of the legislature, or by the board of regents of the state education department or registered by the state education department.

§ 369-b. *Unfair competition defined and made actionable.*—Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provision of section three hundred sixty-nine-a, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby.

§ 369-c. *Exceptions.*—This article shall not apply to any contract or agreement between producers or between wholesalers or between retailers as to the sale or resale prices.

§ 369-d. *Definitions.*—The following terms, as used in this article, are hereby defined as follows: "Producer" means grower, baker, maker, manufacturer or publisher. "Commodity" means any subject of commerce.

§ 369-e. *Effect of partial invalidity.*—If any provision of this article is declared unconstitutional it is the intent of the legislature that the remaining portions thereof shall not be affected but that such remaining portions remain in full force and effect.

Appendix D

Section 1 of the Sherman Act and the Miller-Tydings Amendment Thereto

(Law of July 2, 1890, c. 647, § 1, 26 Stat. 209; as amended by Law of August 17, 1937, c. 690, Title VIII, 50 Stat. 693; 15 U. S. C. § 1)

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: Provided, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. *Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a mis-*

demeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. (Italicized portion is original Sherman Act.)

The McGuire Act

Public Law 542, Act of July 14, 1952, 82d Cong. 2d Sess. (H. R. 5767), 66 Stat. 631.

An Act to amend the Federal Trade Commission Act with respect to certain contracts and agreements which establish minimum or stipulated resale prices and which are extended by State law to persons who are not parties to such contracts and agreements, and for certain other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

It is the purpose of this Act to protect the rights of States under the United States Constitution to regulate their internal affairs and more particularly to enact statutes and laws, and to adopt policies, which authorize contracts and agreements prescribing minimum or stipulated prices for the resale of commodities and to extend the minimum or stipulated prices prescribed by such contracts and agreements to persons who are not parties thereto. It is the further purpose of this Act to permit such statutes, laws, and public policies to apply to commodities, contracts, agreements, and activities in or affecting interstate or foreign commerce.

Sec. 2. Section 5 (a) of the Federal Trade Commission Act, as amended, is hereby amended to read as follows:

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"Sec. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

"(2) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, or requiring a vendee to enter into contracts or agreements prescribing minimum or stipulated prices, for the resale of a commodity which bears, or the label or container of which bears, the trade-mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale.

"(3) Nothing contained in this Act or in any of the Antitrust Acts shall render unlawful the exercise or the enforcement of any right or right of action created by any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia, which in substance provides that willfully and knowingly advertising, offering for sale, or selling any commodity at less than the price or prices prescribed in such contracts or agreements whether the person so advertising, offering for sale, or selling is or is not a party to such a contract or agreement, is unfair competition and is actionable at the suit of any person damaged thereby.

"(4) Neither the making of contracts or agreements as described in paragraph (2) of this subsection, nor the exercise or enforcement of any right or right of action as de-

scribed in paragraph (3) of this subsection shall constitute an unlawful burden or restraint upon, or interference with, commerce.

"(5) Nothing contained in paragraph (2) of this subsection shall make lawful contracts or agreements providing for the establishment or maintenance of minimum or stipulated resale prices on any commodity referred to in paragraph (2) of this subsection, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other.

"(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938, and persons, partnerships, or corporations subject to the Packers and Stockyards Act, 1921, except as provided in section 406 (b) of said Act, from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

APPENDIX E

Excerpts from record in the Court of Appeals of the State of New York

DEFENDANT'S ANSWER

(Fols. 55-65)

THIRTEENTH: Plaintiffs and one or more manufacturers and distributors of phonograph records who are in competition with plaintiffs, have entered into a contract, combination or conspiracy to fix and maintain the retail resale prices of Cetra-Soria and Soria Series phonograph records in trade or commerce among the several states of the United States and with foreign countries.

FOURTEENTH: Plaintiffs and their said competitors sell and distribute their respective phonograph records in trade and commerce among the several states of the United States and with foreign countries.

FIFTEENTH: Defendant is engaged in the sale at retail of phonograph records including those manufactured and distributed by plaintiffs in trade and commerce among the several states of the United States and with foreign countries, and competes with other retailers of phonograph records.

SIXTEENTH: The said contract, combination or conspiracy is in restraint of such trade and is illegal under the provisions of the Sherman Anti-Trust Act, as amended (15 U. S. Code, Secs. 1-7); and constitutes an unlawful method of competition under the Federal Trade Commission Act as amended (15 U. S. Code, Secs. 41-51); and is not authorized by the said Acts, as amended.

SEVENTEENTH: This action was commenced and is maintained as a result of, pursuant to, and in furtherance of the aforedescribed illegal contract, combination or conspiracy.

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EIGHTEENTH: By virtue of the foregoing, plaintiffs are without equity and are not entitled to the equitable relief prayed for in the complaint.

AS AND FOR A FIFTH, SEPARATE AND COMPLETE DEFENSE, DEFENDANT ALLEGES THAT:

NINETEENTH: The defendant is a retailer of phonograph records and maintains a retail store in the City of New York, State of New York.

TWENTIETH: The defendant invites and receives orders from, and sells phonograph records, including those manufactured and distributed by plaintiffs, to consumers thereof in the State of New York and in the several states of the United States and in many foreign countries. The defendant delivers such phonograph records to consumers in his store and in the State of New York, and ships and delivers such phonograph records to consumers in the several states of the United States and in many foreign countries by mail, express and other means of interstate transportation. The defendant competes with other retailers of phonograph records in the State of New York and in the several states of the United States and in foreign countries.

TWENTY-FIRST: The defendant has been engaged in the business of selling phonograph records at retail for approximately twenty years. Throughout that time, defendant has adopted, maintained and developed, and still pursues, a policy in the operation of his business of making sales in large volume at prices which yield to the defendant a small profit for each unit sold. The said policy contemplated and still contemplates that defendant's profits are enhanced by the increase of volume of sales

brought about as a direct result of prices within the purchasing power of greater numbers of people and lower than those usually charged by defendant's competitors.

TWENTY-SECOND: The defendant has advertised and continues to advertise extensively in all parts of the United States and in foreign countries, and has expended and continues to expend large sums of money, time and effort in developing and building his business, the volume of his sales, and the good will inherent in his business.

TWENTY-THIRD: As the result of the defendant's said policy and as a result of the said expenditures of time, money and effort, as set forth above, the defendant has established his business as the largest retail outlet of phonograph records in the world, and defendant's sales volume, including sales of the phonograph records manufactured and distributed by plaintiffs, has been enhanced and developed so that the defendant's sales at this time are at the rate of four million dollars per year. Defendant has established a valuable good will for his said business.

TWENTY-FOURTH: In the development and pursuit of his policy above described, the defendant has purchased and still purchases phonograph records from wholesalers, manufacturers and others, which phonograph records have been acquired by the defendant without contractual restrictions of any kind whatsoever as to the retail resale price thereof or otherwise. At all times, the phonograph records sold by defendant have been his own absolute property.

TWENTY-FIFTH: If defendant is required to adhere to prices and price policies in the retail sale of phonograph records fixed by plaintiffs and others, and if defendant is not permitted to determine and follow his own policies

with respect to prices, defendant's business and his good will inherent therein will be seriously and irreparably injured and damaged.

(Fols. 68-78)

TWENTY-SEVENTH: Plaintiffs sell and distribute their phonograph records in trade and commerce among the several states of the United States and with foreign countries.

TWENTY-EIGHTH: Defendant is engaged in the sale at retail of phonograph records, including those manufactured and distributed by the plaintiffs, in trade and commerce among the several states of the United States and with foreign countries.

TWENTY-NINTH: Plaintiffs have manufactured and distributed, and continue to manufacture and distribute, their phonograph records as aforesaid under a system whereby plaintiffs have attempted and purported to fix the prices at which such phonograph records can be resold by retail dealers to ultimate purchasers thereof.

THIRTIETH: Plaintiffs have engaged, and continue to engage, in various activities to compel and require or otherwise cause retail dealers not to sell plaintiffs' phonograph records below the minimum retail prices attempted or purported to be fixed therefor by the plaintiffs.

THIRTY-FIRST: In furtherance of their said system of distribution, plaintiffs since August, 1952, have entered into agreements in the form as annexed to the complaint as Exhibit "A" with retail dealers for the maintenance of retail resale prices in all States which have enacted so-called "fair trade laws" purporting to authorize such agreements.

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THIRTY-SECOND: The States of Missouri and Texas and the District of Columbia have not enacted laws authorizing such agreements, and in the States of Florida, Michigan, Minnesota and Vermont there are no statutory provisions permitting enforcement of prices fixed by such agreements against parties not signatory to such agreements. The citizens of such States are free to sell phonograph records manufactured and distributed by the plaintiffs at prices determined by themselves without restriction imposed thereon by plaintiffs.

THIRTY-THIRD: In the operation of plaintiffs' resale price maintenance system, as above described, there is a substantial continuous flow of plaintiffs' phonograph records in interstate commerce from plaintiff Raxor Corporation, to plaintiff Soria Sales Corporation, and from plaintiff Soria Sales Corporation to retail dealers and to the general public, and interstate commerce is substantially affected thereby.

THIRTY-FOURTH: In the operation of their resale price maintenance system and their business, as aforesaid, plaintiffs have violated and continue to violate the terms and provisions of the Sherman Anti-Trust Law by contracting, combining and conspiring between themselves and with retail dealers throughout the United States to restrain interstate trade and commerce in their phonograph records among the several States of the United States, and particularly by contracting, combining and conspiring,

(a) to eliminate or suppress, in whole or in part, competition between retailers in the sale of plaintiffs' phonograph records;

(b) to fix and maintain arbitrary prices at which plaintiffs' phonograph records can be resold by retail dealers to consumers thereof; and

(c) to force, compel, require, or otherwise cause retail dealers to agree to, observe, and adhere to resale prices fixed by plaintiff.

THIRTY-FIFTH: In the operation of their resale price maintenance system above described:

(a) Plaintiffs have forced, compelled, or otherwise obtained the execution of so-called fair trade agreement in the form as annexed to the complaint as Exhibit "A" by retail dealers located in the State of New York and throughout the United States;

(b) Plaintiffs have published, distributed or otherwise disseminated to retail dealers located in the State of New York and throughout the United States price lists fixing the minimum retail resale prices for their phonograph records; and

(c) Plaintiffs have threatened to bring, and have brought, legal actions against retail dealers, including defendant, who refused or failed to observe the retail resale prices fixed by the plaintiffs.

THIRTY-SIXTH: The acts of plaintiffs, set forth above, were all done pursuant to, in furtherance of, and for the purpose of effectuating, the conspiracy and combination above alleged.

THIRTY-SEVENTH: By establishing and maintaining the contracts, conspiracy and combination, and by the various acts, as aforesaid, plaintiffs have:

(a) Eliminated and suppressed, in whole or in part, competition between retailers of plaintiffs' phonograph records;

(b) Fixed and maintained arbitrary prices in connection with the resale of plaintiffs' phonograph records;

(c) Unreasonably constrained trade in plaintiffs' phonograph records; and

(d) Used the Trade-mark Laws of the United States for purposes not within the purview of and contrary to the constitutional basis of such laws.

THIRTY-EIGHTH: By reason of the foregoing, the plaintiffs' retail resale price maintenance system and the contracts upon which such system is predicated, and upon which this action is based, are illegal and contrary to public policy as being violative of the Anti-Trust Laws of the United States and, more particularly, of Section 1 of the Sherman Act thereof.

(Fols. 81-86)

FORTY-FIRST: To the extent that the Act of Congress of August 7, 1937 (Chapter 690, Title 8), also known as the Miller-Tydings Act or the Act of Congress of July 14, 1952 (Chapter 745), also known as the McGuire Fair Trade Act, purport to sanction the plaintiffs' resale price maintenance system and the price-fixing agreements entered into thereunder and to adopt for interstate commerce the above mentioned provisions of the General Business Law of the State of New York upon which this action is predicated, such laws are unconstitutional and void in that they:

(a) Deprive defendant of liberty and property without due process of law in violation of the Fifth Amendment of the Constitution of the United States;

(b) Deny defendant equal protection of the laws, in violation of the Fourteenth Amendment of the Constitution of the United States;

(c) Are an unconstitutional delegation of legislative power to various States of the United States in violation of Sections 1 and 8 of Article 1 of the Constitution of the United States, and of Article VI of the Constitution of the United States; and

(d) Are an unconstitutional delegation of legislative power to private persons in violation of Section 8 of Article 1 of the Constitution of the United States.

AS AND FOR AN EIGHTH, SEPARATE AND PARTIAL DEFENSE, DEFENDANT ALLEGES THAT:

FORTY-SECOND: Defendant repeats and realleges each and every allegation contained in paragraphs hereof marked "Nineteenth" through "Twenty-fifth", both inclusive, and "Twenty-seventh" through "Thirty-seventh", both inclusive.

FORTY-THIRD: To the extent that defendant's sales of phonograph records manufactured and distributed by plaintiffs constitute trade and commerce among the several States of the United States and with foreign countries, and with respect to sale and shipments of such phonograph records made by defendant in such trade and commerce;

(a) Sections 369-a *et seq.* of the General Business Law of the State of New York do not apply, and defendant's said sales at prices other than or below the prices purported to be fixed therefor by plaintiffs pursuant to such statute do not constitute unfair competition as provided by said statute; and

(b) Any attempts by plaintiffs to fix the prices for defendant's said sales are in violation of, and not exempted from the provisions of, the Sherman Anti-Trust Act, as amended (15 U.S. Code, Secs. 1-7), and the Federal Trade Commission Act, as amended (15 U. S. Code, Secs. 41-51).

Appendix E

Defendant's Motion to Dismiss

(Fols. 177, 178, 186)

Mr. Lowenthal: If your Honor please, the defendant moves to dismiss on two grounds: First—

The Referee: All you need is one good ground.

Mr. Lowenthal: I didn't say two good ones, your Honor.

The first ground which the defendant urges is that in plaintiffs' case it has been shown that plaintiff has no further interest in the trade-marks which it seeks to protect by the maintenance of these so-called fair trade contracts.

An agreement exists which requires the complete assignment of the trade-mark and all rights and good will thereunder from the plaintiff to a third party, and therefore under the theory under which these fair trade agreements have been sustained in the Old Dearborn case, and of the cases that followed it, there is no trade-mark right to protect and, therefore, the action is merely one for price-fixing and should be dismissed.

* * * * * * *

The Referee: Decision reserved.